

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT L. THOMPSON

Claimant

VS.

STATE OF KANSAS

Self-Insured Respondent

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Docket No. 1,032,264

ORDER

Respondent appealed the February 6, 2007, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

Claimant alleges he injured his right shoulder on October 4, 2006, when he lifted some weights during an employee appreciation festival. Judge Howard impliedly found that claimant's alleged accident arose out of and in the course of his employment with respondent as the Judge granted claimant's request for medical benefits.

Respondent contends Judge Howard erred. Respondent argues claimant was not required to attend the festival and that he was injured in an activity that was outside the scope of the employee appreciation festival. Citing K.S.A. 44-508(f), respondent contends claimant's accident did not arise out of and in the course of his employment. In short, respondent requests the Board to deny claimant's request for benefits.

Conversely, claimant contends the preliminary hearing Order should be affirmed. Claimant argues his accident occurred at work, during his normal workday, and while being paid. Accordingly, claimant argues his accident arose out of and in the course of his employment with respondent.

The only issue on this appeal is whether claimant's alleged accident arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds the preliminary hearing Order should be affirmed.

Claimant is employed as an equipment operator in the landscape department at the University of Kansas Medical Center. On October 4, 2006, while attending an employee appreciation festival, claimant injured his right shoulder when he lifted some weights.

The festival, which was being held at the fitness center on the medical center campus, provided food from numerous vendors, several bands, and various activities such as a free-throw shooting contest, kicking soccer balls, and hitting golf balls. Food vendors were located on both the main floor of the fitness center and the upper floor, which is a large open room with a track and exercise equipment.

Claimant and his co-workers had permission to attend the duration of the festival, which claimant testified was scheduled from 10 a.m. to 2 p.m., but they were expected to return to their regular work duties at the festival's conclusion. Moreover, claimant was being paid while attending the festival and he was not advised the exercise equipment was off-limits to the festival participants. Claimant believed the situation was similar to an open house for the fitness center to display its equipment and promote its business. Claimant testified, in part:

Q. (Mr. Alvarez) When you were using that equipment did you, in your mind did you believe that you had the authorization to be doing that?

A. (Claimant) Yeah, I did.

Q. Why did you believe that?

A. Because to me it was, the gym was open. It was like it was open house for them to kind of promote their business, for allowing us to be there so they could show off their equipment and let you use it if you wanted to.¹

The Workers Compensation Act expressly states that it should be liberally construed to bring employers and employees within its provisions. But once it is determined the parties are within the Act, the Act's provisions must be applied impartially.

It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the

¹ P.H. Trans. at 7.

provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.²

In addition, the Act specifically provides that injuries to employees while engaged in social or recreational activities do not arise out of and in the course of a worker's employment.

The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.³

But the Act does not define what a recreational or social event might be. Indeed, under some definitions work is a social activity and a recreational activity is something done *after* work or only away from work. Accordingly, it is unclear whether the legislature intended to exclude from the Act social activity that occurs at work during normal work hours or, instead, whether the intent was to exclude those recreational and social activities that occur outside work hours and away from the workplace such as an award ceremony or the company softball game. Understanding that work often entails social interaction and that the Workers Compensation Act was intended to be liberally construed to bring employers and employees within its provisions, the undersigned finds claimant's October 2006 accident did not occur during a recreational or social event as contemplated by K.S.A. 2006 Supp. 44-508(f).

We now turn to respondent's argument that claimant's request for benefits must be denied as he was injured in an activity that was outside the scope of the festival. That argument fails as the evidence indicates the festival participants were not restricted from using the fitness center's exercise equipment. Claimant's testimony in that regard is credible. Moreover, the letter from Rick Robards, Director of Human Resources for the University of Kansas Medical Center, does not indicate that claimant or his co-workers were advised they could not look at or use the fitness center's exercise equipment. Consequently, at this juncture claimant's testimony on that issue is uncontradicted.

² K.S.A. 2006 Supp. 44-501(g).

³ K.S.A. 2006 Supp. 44-508(f).

In summary, claimant was injured at work during normal work hours in an activity that was incidental to his employment. Accordingly, claimant's accident arose out of and in the course of his employment with respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the February 6, 2007, preliminary hearing Order.

IT IS SO ORDERED.

Dated this ____ day of April, 2007.

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Marcia L. Yates, Attorney for Respondent
Steven J. Howard, Administrative Law Judge

⁴ K.S.A. 44-534a.